



## **FINDINGS OF FACT & CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) The Appeals Board finds that claimant, as a result of his accidental injury arising out of and in the course of his employment in February, 1990, has suffered a twelve percent (12%) permanent partial general disability to the body as a whole. The Appeals Board further finds that claimant, as a result of this injury, is not entitled to work disability.

Claimant, a 43-year-old male, began working at respondent's plant in January, 1990. Shortly thereafter he began experiencing hand and wrist problems. After being referred to several doctors, claimant was diagnosed as having bilateral carpal tunnel syndrome and bilateral chronic tendinitis of the hands and wrists. Claimant was referred to Dr. C. Reiff Brown in Great Bend, Kansas who performed surgery on the left wrist on January 31, 1991, and the right wrist on February 21, 1991. Subsequent to the surgeries, claimant was returned to work with his former employer in an accommodated position.

The respondent accommodated claimant by placing him in packaging department following Dr. Brown's permanent restrictions that claimant avoid repetitive flexion and extension of the wrists. The claimant was returned to work within these restrictions at a wage comparable to the average weekly wage claimant was earning on the date of injury.

Claimant continued his employment with the respondent until April, 1992, at which time he voluntarily terminated his employment to take another job at an auto detailing company, as the reconditioning department manager at a starting salary of \$7.00 per

hour. The claimant had been employed in this same capacity prior to his employment with the respondent.

The parties stipulated to an average weekly wage of \$242.00 per week in this matter. The Workers Compensation Appeals Board finds that claimant's wages of \$7.00 per hour after his termination of employment, and his salary of \$1,500.00 per month at the regular hearing both exceed claimant's average weekly wage on the date of the injury and constitute a comparable wage.

K.S.A. 44-501(a) states in part:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an

issue is more probably true than not true," on the basis of the whole record.

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all of the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of a disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 786, 817 P.2d 212 (1991).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds that based upon a review of the entire record, claimant has failed to show by a preponderance of the credible evidence that the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e(a) has been overcome. As such, claimant is limited to functional impairment.

K.S.A. 1992 Supp. 44-510e(a) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. C. Reiff Brown, the only doctor to opine an impairment rating in this matter, rated claimant at fifteen percent (15%) to each upper extremity which equates to a six percent (6%) whole body rating to each upper extremity which combined equals a twelve percent (12%) permanent partial general disability to the body as a whole on a functional basis.

The Appeals Board finds claimant has proven by a preponderance of the credible evidence that he is entitled to a twelve percent (12%) permanent partial general disability on a functional basis.

The Appeals Board further finds claimant is entitled to future medical treatment upon proper application to and approval by the Director of Workers Compensation.

The Appeals Board further finds claimant is entitled to vocational rehabilitation benefits only upon proper application to and approval by the Director of Workers Compensation.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Thomas F. Richardson dated November 18, 1993, is affirmed in all respects and an award of compensation is hereby entered in favor of the claimant, Jose Baca, Jr., and against the respondent, Monfort, Inc., and the insurance

carrier, City Insurance.

The claimant is entitled to 46.95 weeks of temporary total disability at the rate of \$160.01 per week totalling \$7,512.47 followed by 368.05 weeks of permanent partial general disability at \$19.20 per week totalling \$7,066.56 for a twelve percent (12%) permanent partial disability to the body as a whole on a functional basis for a total award of \$14,579.03. As of January 27, 1994, there would be due and owing to the claimant 46.95 weeks of temporary total compensation at \$160.01 per week in the sum of \$7,512.47 plus 161.33 weeks permanent partial compensation at \$19.20 per week in the sum of \$3,097.54 for a total due and owing of \$10,610.01 which is ordered paid in one lump sum less amount previously paid. Thereafter, the remaining balance in the amount of \$3,969.02 shall be paid at \$19.20 per week for 206.72 weeks or until further order of the Director.

Claimant's contract of employment with his attorney is approved subject to the provisions of K.S.A. 44-536.

Fees and expenses of administration of the Kansas Workers Compensation Act are assessed against the respondent and insurance carrier to be paid as follows:

Underwood & Shane	
Transcript of proceedings	\$205.90
Underwood & Shane	
Deposition of Dr. Brown	\$231.00
Tri-State Reporting Service	
Deposition of Dr. Arroyo	\$171.50
Owens, Brake & Associates	
Deposition of Monty Longacre	\$204.50
Tri-State Reporting Service	
Deposition of Dr. Welch	\$113.53
Tri-State Reporting Service	
Deposition of Cheryl Fisher	\$101.63
Tri-State Reporting Service	
Deposition of Ernesto Rodriguez	\$134.54
Tri-State Reporting Service	
Deposition Jose Baca	\$ 76.13

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of February, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Jon R. Craig, 1505 East Fulton Terrace, Garden City, Kansas 67846  
Terrence J. Malone, P.O. Box 39, Dodge City, Kansas 67801  
Thomas F. Richardson, Administrative Law Judge  
George Gomez, Director